



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 145 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE MBATHA KASOMO (DECEASED)

MBAIKA MBATHA

DOMINIC MASILA MBATHAAPPLICANTS

VERSUS

PATRICK KYALO MBATHA

FLORENCE R. SAMUEL MBATHA.....RESPONDENTS

RULING

1. By Summons for Revocation or of Grant dated 28th August, 2017, the Applicants herein, **Mbaika Mbatha** and **Dominic Masila Mbatha**, seek an order that the grant of letters of administration issued to the petitioners and confirmed on 30th August, 2016 be revoked and or annulled.

2. According to the applicants, they are the 2nd wife and a son of the deceased herein respectively. It was their contention that the petitioners herein failed to disclose that the deceased was married to two wives, the first wife being the 1st applicant while the 2nd wife was **Mueke Mbatha** who is also deceased. It was therefore averred that the proceedings herein were defective in that the petitioners did not obtain the consent of the beneficiaries to petition for letters of administration and further they never disclosed to the applicants that they had petitioned for the same. In addition, the applicants were never informed to attend court when the matter came up for summons for confirmation of the said grant.

3. In reply to the said summons, **Patrick Kyalo Mbatha**, a co-administrator swore an affidavit in which he denied that the applicants were not included in the summons for confirmation of grant as their names were clearly included as beneficiaries in the affidavit in support of the application for confirmation. It was averred that the applicants also signed the consent for the said confirmation hence they are not being truthful. According to the deponent, the applicants even attended court when the said summons came up for hearing and gave their consent to the same and were in fact given land in the said summons and were satisfied with the distribution. It was therefore sought that the present summons be dismissed.

Determination

4. I have considered the summons, the affidavits both in support of and in opposition to the application and the submissions filed.

5. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a)that the proceedings to obtain the grant were defective in substance;

(b)that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant

notwithstanding that the allegation was made in ignorance or inadvertently;

6. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

7. Section 39(1) of the Act which falls under Part V deals with situations where the intestate has left no surviving spouse or children and provides that:

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

8. Section 51 (2) of the *Law of Succession Act* provides that:-

An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

9. In this case, it is clear that the Petitioner herein did not rank in priority to the Objectors/Applicants. In fact, the 1st Objector/Applicant being a widow of the deceased ranked in priority to the petitioners who were sons of the deceased. In the affidavit in support of the petition, the petitioners did not even disclose the fact that the Objectors were wife and son of the deceased. Similarly, in the summons for confirmation of grant the Objectors were not provided for at all contrary to the averments of the petitioners.

10. It is clear that the Petitioners could only lawfully petition for grant upon receiving a consent from the Objectors, or upon citation having notified the Objector of their intention to petition for grant in respect of the deceased's estate. This must be so because Part VI Rule 26(1) of the **Probate and Administration Rules** on the other hand provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

11. In either case, the Petitioners was obliged to disclose not only their relationship with the deceased but also the names and addresses of all surviving widows and children of the deceased. It is clear that in this case the Petitioners omitted the names of the Objectors herein for reasons known to themselves. It is therefore clear based on the evidence before me that the Petitioners did not disclose all the material required to have been disclosed and they were not the right persons to have petitioned for grant in the circumstances. Section 52 of the Act provides that:

Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

12. In the premises I have no hesitation in revoking the grant issued to the Petitioners herein and confirmed on 30th August, 2016. I hereby direct the Petitioners to within three days from the date of service of this order upon them return the original Grant issued to them to this court's registry for cancellation.

13. As the dispute pits members of the same family, there will be no order as to costs.

14. It is so ordered.

Read, signed and delivered in open Court at Machakos this 7th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey